No. _____

In the
Supreme Court of the United States

XAVIER GREEN, aka XG,
Petitioner,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT,
aka San Diego City Schools, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 14, 2007

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QUESTION PRESENTED

Do California school districts enjoy immunity from suit under the Eleventh Amendment to the United States Constitution (Eleventh Amendment) as local educational agencies, or is immunity denied under the Eleventh Amendment for the same reasons immunity is not available to other states in the Ninth Circuit, including Nevada, Arizona and Alaska.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner: Xavier Green, formerly identified as X.G., a minor, by J.W., his guardian ad litem.

Defendants-Appellees and Respondents: San Diego Unified School District, also known as San Diego City Schools; Janice Davis Winston; Richard Thibodeau; Jeanine Cunningham; Beth Richer; and Leonore Smith.

CORPORATE DISCLOSURE STATEMENT

The San Diego Unified School District, also known as San Diego City Schools, is a local public entity of the State of California.

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PETITION FOR A WRIT OF CERTIORARI

Xavier Green (Xavier) respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated March 16, 2007, is a slip opinion, not published but unofficially reported at 2007 WL 786788 (9th Cir. (Cal.)), and is reproduced at App. A., 1a-3a.

The Order of dismissal issued by the United States District Court for the Southern District of California, filed January 4, 2005, is not reported, and is reproduced at App. C, 6a-16a.

The Order on summary judgment or adjudication issued by the United States District Court, dated June 22, 2004, is not reported, and is reproduced at App. D, 17a-55a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was entered on March 16, 2007, and is reproduced at App. B, 4a-5a. This petition is timely under 28 U.S.C. §2102(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XI
Suits Against States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

This action arises from a vicious attack on March 7, 2001, against Xavier, a permanently disabled black boy, by his peers, on school grounds, when he was a 15 year old 9th grade student attending school within the jurisdiction and under the care, custody and control of defendants, San Diego Unified School District (San Diego Unified), and the individual defendants. App.7a-8a, 18a, 21a.

Xavier's use of his left arm is severely limited in that he is unable to lift the arm due to permanent nerve damage known as Erb's Palsy. App. 18a. His peers harassed Xavier about his disability by persistently addressing him as "faggot" and "bitch." App.19a. Because Xavier liked to ride a skateboard, his peers continuously referred to him as "white boy" which to him was a negative connotation. App. 19a.

The attack on Xavier by his peers occurred after Xavier complained, in 1997 and again from November 2000 through March 7, 2001, to his school counselors (defendants, Winston and Thibodeau), and to the school nurses (defendants, Cunningham and Richer), about his fears and suicidal ideations, arising out of the peer harassment and discriminatory conduct. App. 19a-21a. The peer harassment

was directed to both Xavier's disability because his disability caused his left arm to hang limp, resulting in the peers calling him "faggot" (App. 39a), and to his race as an African American in a form of reverse discrimination when his peers continually identified him as "white boy" because he liked to ride a skate board. App. 19a.

The March 7, 2001 attack was followed by a second attack the next day resulting in Xavier's expulsion from school by the vice principal, defendant, Smith. App. 21a-22a. On August 28, 2001, the San Diego Unified determined the expulsion should not have proceeded and Xavier returned to school. App. 22a.

In the year prior to the attacks on Xavier, there were twenty-one acts of violence and peer harassment of other students on campus. App. 41a. This ongoing pattern of violence created a hostile educational environment for Xavier. App. 41a.

Xavier timely filed his first amended complaint in the United States District Court, Southern District of California, on August 13, 2002, for personal injuries against the school district, the nurses, counselors and vice principal, alleging causes of action under 42 U.S.C. §§1983, 1985, for deprivation of equal protection under the Fourteenth Amendment of the United States Constitution (Fourteenth Amendment), violation of Title II of the Americans with Disabilities Act (ADA) (42 U.S.C. §12123), common law and state law claims. App. 8a, 23a.

Federal jurisdiction was invoked in the United States District Court by original jurisdiction under 28 U.S.C. §§ 1331, 1343 and supplemental jurisdiction under 28 U.S.C. § 1367 to determine the state law claims.

On June 22, 2004, the district court entered an order denying defendants' motion for summary judgment as to Xavier's Fourteenth Amendment claims against defendants, Winston, Thibodeau and Cunningham in their personal capacities on the basis that Xavier has raised a genuine issue of material fact as to whether the individual defendants' actions or failures to act were because of Xavier's disabilities. App. 8a, 38a-39a. The order further denied summary judgment on the common law claim for negligence. App. 8a, 50a. Xavier's ADA claim was dismissed as to all defendants on the basis that plaintiff had not shown deliberate indifference. App. 43a. Plaintiff's Fourteenth Amendment claim against the San Diego Unified was dismissed on the basis that the San Diego Unified is an arm of the state, immune from suit in federal court. App.37a.

On January 3, 2005, on motions in limine prior to trial, the district court entered its order dismissing the Fourteenth Amendment claims against the individuals on the basis that there was no genuine issue of material fact as to whether the individual defendants' response to the peer harassment was based upon Xavier's disability. App. 15a. The negligence claim was dismissed on the basis that Eleventh Amendment grants immunity to the school district in federal court. App. 11a-12a.

Xavier timely filed his appeal to the Ninth Circuit Court of Appeals on February 3, 2005, which affirmed the district court's orders on March 16, 2007, without review of the Eleventh Amendment issue on the basis that Xavier did not establish that defendants acted with deliberate indifference, both as to the ADA and the Fourteenth Amendment claims. App. 2a-2b.

REASONS FOR GRANTING THE PETITION

This Ninth Circuit Court of Appeals has held that Eleventh Amendment immunity does not apply to public school districts in Alaska, Arizona and Nevada, but for the very same reasons has granted immunity in California.

The Eleventh Amendment will not bar suit against local public entities such as school districts. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 280 (1977). The Ninth Circuit Court of Appeals has ruled, however, that California's school districts enjoy Eleventh Amendment protection.. *Belanger v. Madera Unified School District*, 963 F.2d 248, 251 (9th Cir. 1992).

I. The Ninth Circuit's Holding in *Belanger* Conflicts with its Grant of Immunity to Other States in the Circuit.

The Ninth Circuit Court of Appeals has recently issued decisions in three neighboring states which are *contra* to the *Belanger* decision, finding that Alaska, Arizona and Nevada school districts are not protected from suit in federal court by Eleventh Amendment immunity.

In 2002, Nevada school districts were found to not be instrumentalities of the state, denying Eleventh Amendment protection. *Eason v. Clark County Sch. Dist.*, 303 F.3d. 1137 (9th Circ. 2002). "[t]his Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities even though such entities exercise a 'slice of power'." *Eason v. Clark County Sch. Dist., supra*, 303 F.3d at 1141. The Ninth Circuit Court of Appeals identified the primary criteria for determining whether the school district was a local or state entity, which was "whether a money judgment would be

satisfied out of state funds ..." to find that the Nevada public school district was a local entity and not immune. *Id.*

The *Eason* court noted that "[m]ost courts have held that school districts are not entitled to Eleventh Amendment immunity." *Id.* There the court cited decisions in 14 states which do not provide their school districts with Eleventh Amendment protection including Florida, North Carolina, New Mexico, Utah, Alabama, Pennsylvania, Connecticut, Texas, New York, Louisiana, Illinois, Wyoming, Kansas and Mississippi. *Eason v. Clark County Sch. Dist., supra,* 303 F.3d at 1141, FN2. The Circuit Courts of Appeals which deny immunity include the 2nd Circuit, 3rd Circuit, 4th Circuit, 5th Circuit, 7th Circuit, 10th Circuit, and 11th Circuit. *Id.*

Following *Eason,* in 2003, the Ninth Circuit Court of Appeals held that Alaska's school district was not a state agency entitled to immunity, because it resembled the Nevada school system. *Holz v. Nenana City Public School District*, 347 F.3d 1176, 1181 (9th Cir. 2003).

Again in 2003, the Ninth Circuit Court of Appeals held the public school district in Arizona was not immune under the Eleventh Amendment, using the same analysis in *Eason* and *Holz*, concluding that the local educational agency would bear the burdens, not the state. *Savage v. Glendale Union High School*, 343 F.3d 1036 (9th Cir. 2003).

II. Review Is Warranted to Resolve the Conflict When All Five *Mitchell* Factors Affirm California's School Districts Are Local Entities Not Subject to Immunity.

A five factor test has been adopted by the Ninth Circuit to determine whether an entity is an arm of the state. *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th

Cir. 1988). The *Mitchell* factors include: (1) whether a judgment will affect the state treasury, (2) the corporate status of the entity, (3) whether the entity provides a statewide function, (4) whether the entity can sue and be sued in its own name, and (5) whether the entity has the power to own property. *Mitchell, Id.*

A. The First Factor - Legal Liability for Judgments - Resides With California's Local Educational Entity Under California's Government Code.

The focus of the first *Mitchell* factor - whether a judgment will affect the state treasury - has been changed to, whether the entity is itself legally liable for the monetary judgment. *Regents of the University of California v. Doe,* 519 U.S. 425, 430-31 (1997). Vulnerability of the state's purse remains a guiding principle of Eleventh Amendment determinations. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994).

The State of California is not legally liable for a monetary judgment against a local school district because, under state law, school districts, such as the San Diego Unified, can sue and be sued in their own name, must purchase their own liability insurance and pay their own debts and judgments. In *Johnson v. San Diego Unified School District* (1990), 217 Cal.App.3d 692, 699, the Fourth District Court of Appeal of the State of California affirmed the San Diego Superior Court decision that a California school district is a 'local public entity' with no agency relationship to the State. The *Johnson* court said,

> The separate distinct character of the school district as distinguished from the state educational entities is made clear by the statutory provisions requiring the

> governing board of any school district to purchase liability insurance (Ed. Code [FN3] §35208), to be liable for debts and contracts (§35200), to pay judgments (former §35201) ... to contract with private counsel (§35204) or for legal services (§35205), etc. [FN4].

Johnson, supra, 217 Cal.App.3d at 699.

Further, California's statutes require the school district to pay claims made against them (California Education Code §35202), mandates that they shall provide for their own liability insurance (California Education Code §35208), or be self-insured out of their own funding (California Education Code §35214), and provide rules for reimbursement of personal property (California Education Code §35213). The *Belanger* court did not have before it these definitive statutes for review.

Former California Education Code §35201, repealed in 1980, provided that the school district satisfy any judgments with payment from the school district funds. The Law Revision Commission Comment to California Education Code §35201, identifies this section as superseded by the comprehensive statutes for payment of money judgments against local public entities under California Government Code §§970-971.2. 15 Cal. L. Rev. Comm. Reports 1257 (1980).

The *Johnson* court recognized this and remarked that, by making this change from California's Education Code to California's Government Code to provide for a school district's payment of judgments, "... the Legislature impliedly treated the school district as a 'local public entity' ..." *Johnson, supra,* 217 Cal. App.3d at 700, FN5

The *Johnson* court held, upon reviewing the pertinent statutes, that the California school district is a local public entity under the California Government Tort Claims Act, because claims made against a state agency required payment to be issued by the State Controller, whereas the local school district paid its own judgments. The court said, "It is without dispute here that potential liability rests not with the state, but the school district." *Johnson, Id.*

California's Government Code §§ 970 *et seq.*, outlining the provisions for payment of judgments against local public entities, provides a definition of the local public entity, which excludes the state, and further delineates the time for enforcing judgments (California Government Code §970.1), the manner of payment enforceable by a writ of mandate against the local entity (California Government Code §970.2), payment of interest on the judgment (California Government Code §970.5), payment of court costs on a judgment [California Government Code §971(c)], and investments for judgments (California Government Code §971.2). The *Johnson* court summed it up, by saying, "There is no statute imposing liability on the state for the torts of such separate public entities (Citation)." *Johnson, supra,* 217 Cal. App.3d at 699.

In the case at bar, the district court affirmed that the state does not pay for judgments against California school districts, that the school districts themselves pay their own judgments, but followed the *Belanger* holding as binding precedent in the Ninth Circuit, which found the state "practically" liable for judgments against the school districts because the majority of funding for school programs comes from the state. App. 36a-37a. The district court found that the *Belanger* decision must stand regardless of the state appellate court finding in Johnson. App. 37a. The district court stated that "[]he fact

that the court in *Johnson* found judgments against the school district are not paid by the state controller is not determinative under the first factor in the *Belanger* analysis." App. 37a.

B. The Second Factor - The State's Sovereignty Is Not Disturbed by Judgments Against The Educational Entity

Once it is found that the state is not liable for money judgments against the local educational entity, a review must be made of the effect a lawsuit against the school district might have on the dignity of the state as a sovereign. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996); *Hess v. Port Auth. Trans-Hudson Corp.*, *supra,* 513 U.S. at 40-41. The remaining four *Mitchell* factors address the relationship between the sovereign and the local educational entity.

California's Government Code again, in the California Tort Claims Act, defines a local public entity to specifically exclude the state: "'Local public entity' includes a county, city, district, public authority, public agency, and any other political subdivisions or public corporation in the State, but does not include the State." California Government Code §900.4. *See also, Johnson v. San Diego Unified School District, supra*, 217 Cal. App.3d at 699.

The California legislature has also issued a definition for the state, which provides, as an enumerated requirement for an agency of the state, that claims against the state are paid by the state's Controller: "'State' means the State and any office, officer, department, division, bureau, board, commission or agency of the State claims against which are paid by warrants drawn by the Controller." California Government Code

§900.6. *Johnson v. San Diego Unified School District*, 217 Cal. App.3d at 699.

California's legislature has provided for the school district's status as a political subdivision and local public entity through these definitions provided in California's Government Code, Sections 900.4 and 900.6. *Johnson v. San Diego Unified School District, supra*, 217 Cal. App.3d at 699.

C. The Third Factor - The School District Functions As A Local Public Entity

The *Johnson* court addressed the school district's performance of its duties through the local school board, the means by which it carries out its authority.

> School districts, by statutory provision, act through school boards and the authority of the districts is measured by the authority statutorily conferred upon the boards. (*Gonzales v. State of California* (1972) 29 Cal. App.3d 585, 590 [105 Cal. Rptr. 804]; see *First Interstate Bank v. State of California, supra*, 197 Cal. App.3d [627] at pp. 633-634 [1987].)
>
> The constitutional and derivative statutory scheme governing education in California does not intend to impose upon the state the duty to supervise schoolchildren attending schools operated by school districts, but rather to discharge the broad responsibilities of the state in educating its children through state agencies which are separate and distinct public entities.

Johnson v. San Diego Unified School District, 217 Cal. App.3d at 699. The function, then of the local school districts is to attend to its local responsibilities through the local school board.

D. The Fourth Factor - The Local Educational Entity Can Sue and Be Sued

California has enacted an elaborate method for addressing tort claims made against its governmental entities. California Government Code §§900, *et seq.*, 940, *et seq.* The *Johnson* court discusses the application of California's school districts to California's Government Tort Claims Act:

> Its [the school district's] separate distinct character withstands application of the [Gov. Tort Claims] Act (Gov. Code, §900 et seq.), which governs all claims for money or damages against the school district. ([Educ. Code] §35202).

[Clarification inserted] *Johnson v. San Diego Unified School District, supra,* 217 Cal. App.3d at 699. Further, the *Johnson* court analyzed the duties of California's state agencies, identifying that, although local school districts are agents of the state, they do not represent the state. *Johnson v. San Diego Unified School District, supra,* 217 Cal. App.3d at 698-699.

> "State agencies, even though exercising a portion of the state's powers of government, are not the state or a part of the state [citation]; and may not act on behalf of the state unless authorized to do so by statute [citation]."

Johnson v. San Diego Unified School District, supra, 217 Cal. App.3d at 699.

E. The Fifth Factor - California's School Districts Are Granted The Power to Own Property By California's Education Code

The California Education Code has provided for its local school districts to buy, sell, lease and convey real and personal property in its name.

> The governing board of any school district shall receive in the name of the district conveyances for all property received and purchased by it, and shall make in the name of the district conveyances of all property belonging to the district and sold by it.

California Education Code §17385. Chapter 4 of the California Education Code contains extensive provision for transactions of property held by the local school district. In summary, the *Johnson* court concluded:

> "[T]he fact that a state agency is created by statute to discharge a duty constitutionally imposed on the state does not transmute the agency into 'the state,' nor render the state liable for its acts under a general theory of respondeat superior. [Citations.]" (*First Interstate Bank v. State of California* (1987) 197 Cal. App.3d 627, 633 [243 Cal. Rptr. 8].)

Johnson v. San Diego Superior Court, supra, 217 Cal. App.3d at 699.

Thus, certiorari is warranted to resolve a split within the Ninth Circuit as to the application of Eleventh Amendment

immunity, specifically in California where its own appellate court has found the school districts are local educational entities not immune.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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